

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
LAS VEGAS DIVISION

IN RE: USA COMMERCIAL MORTGAGE )  
COMPANY. )  
 )  
 ) CIVIL  
 )  
 ) Las Vegas, Nevada  
 )  
 ) Tuesday, January 19, 2010  
 ) (3:32 p.m. to 5:11 p.m.)

MEMBER CASES: 3:07-cv-0241-RCJ-GWF; 2:07-cv-1133-RCJ-GWF;  
2:07-cv-0894-RCJ-GWF; 2:08-cv-1389-RCJ-GWF

IN RE: ASSET RESOLUTION, LLC., )  
 )  
 ) CASE NO: 2:09-BK-32824-RCJ  
 ) (Adv. Proc. 09-1410)  
 )  
 )

MEMBER CASES: 2:09-BK-32831-RCJ; 2:09-BK-32839-RCJ;  
2:09-BK-32843-RCJ; 2:09-BK-32844-RCJ; 2:09-BK-32846-RCJ;  
2:09-BK-32849-RCJ; 2:09-BK-32851-RCJ; 2:09-BK-32853-RCJ;  
2:09-BK-32868-RCJ; 2:09-BK-32873-RCJ; 2:09-BK-32875-RCJ;  
2:09-BK-32878-RCJ; 2:09-BK-32880-RCJ; 2:09-BK-32882-RCJ;

- 1) MOTION FOR ORDER CONVERTING BANKRUPTCY CASES TO CHAPTER 7,  
OR ALTERNATIVELY, TO APPOINT A TRUSTEE (136, 09-BK-32824);
- 2) APPLICATION OF THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS FOR ORDER AUTHORIZING RETENTION  
OF NACHMAN HAYS BROWNSTEIN, INC, NUNC PRO TUNC;
- 3) CALENDAR CALL - TRIAL SETTING RE 2:07-CV-892

BEFORE THE HONORABLE ROBERT C. JONES,  
UNITED STATES DISTRICT JUDGE

Appearances: See Next Page

Court Recorder: Araceli Bareng

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Also present: CRIS RODRIGUEZ (Telephonic)

Courtroom Administrator: K. Goetsch

1        Las Vegas, Nevada; Tuesday, January 19, 2010; 3:32 p.m.

2                    (Courtroom and Telephonic Appearances)

3                    (Call to Order)

4            **THE CLERK:** All rise.

5            **THE COURT:** Good afternoon, and thank you. Please be  
6 seated.

7            We're here in a withdrawn bankruptcy case. I'm  
8 sorry. The formal name of the case is *Asset Resolution, LLC*.  
9 Judge Jones here sitting in bankruptcy as a district court  
10 judge, of course, Article III, but in a bankruptcy case  
11 withdrawn under the provisions of Title 28.

12            Let's start with appearances, please.

13            **MR. KLESTADT:** Good afternoon, your Honor. Tracy  
14 Klestadt of Klestadt and Winters, counsel to the debtors.

15            **MR. HOWARD:** Good afternoon, your Honor. Randolph  
16 Howard, Kolesar and Leatham, on behalf of the debtor as local  
17 counsel.

18            **MS. ELLS:** Good morning, your Honor. Melanie Ells  
19 appearing as local counsel on behalf of Silar and Silar  
20 Advisors.

21            **COURT RECORDER:** Please move closer to the  
22 microphone. This microphone --

23            **THE COURT:** Just a little bit louder into the  
24 microphone.

25            **COURT RECORDER:** Thank you.

1           **THE COURT:** I'm sorry.

2           **MS. ELLS:** Good afternoon, your Honor. Melanie Ells  
3 appearing on behalf of Silar and Silar Advisors as local  
4 counsel. I'm here with Frank Majorie, who has filed a pro hac  
5 application for this case; has not yet been granted. He's  
6 asking for special permission to appear.

7           **THE COURT:** Appear for?

8           **MS. ELLS:** Just for purposes of this hearing until --

9           **THE COURT:** For?

10          **MS. ELLS:** -- his pro hac application.

11          **MR. MAJORIE:** Oh. I'm sorry.

12          **MS. ELLS:** On behalf of Silar.

13          **THE COURT:** Very good.

14          **MR. MAJORIE:** Thank you, Judge. Francis B. Majorie  
15 on behalf of Silar Advisors and Silar Special Opportunities  
16 Fund.

17               I filed a pro hac in the ARC bankruptcy, and I've  
18 also filed a pro hac in the 892. Mr. Hymanson is here for the  
19 892 as local counsel for 892.

20          **THE COURT:** Thank you. That's not a matter of  
21 permission by the Court appointing; that's simply pro hac vice  
22 appearance, and that may be approved.

23          **MR. KINEL:** Good afternoon, your Honor. Norman Kinel  
24 of Duval and Stachenfeld on behalf of the creditors committee.

25          **THE COURT:** Mr. Hymanson.

1           **MR. HYMANSON:** Good afternoon, your Honor. Phil  
2 Hymanson on behalf of Silar.

3           **THE COURT:** Thank you.  
4 On the telephone?

5           **MR. DUNCAN:** McAlan Duncan --

6           **MR. KIRBY:** Dean Kirby --

7           **MR. DUNCAN:** -- on behalf of the special direct  
8 lenders.

9           **MR. KIRBY:** I'm sorry. Dean Kirby, Kirby and  
10 McGuinn, on behalf of Debt Acquisition Company of America V,  
11 LLC.

12           **MS. BLOOM:** Good afternoon, your Honor. Michal Bloom  
13 on behalf of the United States Trustee.

14           **COURT RECORDER:** I'm sorry; there's a microphone next  
15 to you. Thank you.

16           **MS. BLOOM:** Does it work?

17           **THE COURT:** Yes. Ms. Bloom, please.

18           **MS. BLOOM:** Michal Bloom on behalf of the United  
19 States Trustee.

20           **THE COURT:** Thank you.

21           **MR. GREEN:** Good afternoon, your Honor. James Green,  
22 local counsel for the unsecured creditors committee.

23           **THE COURT:** Thank you.

24           **MS. CHUBB:** Good afternoon, your Honor. Jan Chubb,  
25 Michael Collins, and Rob Millimet for the certain direct

1 lenders.

2 **THE COURT:** Thank you.

3 **MS. RASMUSSEN:** Good afternoon, your Honor. Lisa  
4 Rasmussen on behalf of the entity counter defendants and  
5 certain direct lenders.

6 **THE COURT:** Thank you.

7 **MS. NORMAN:** Do I need a microphone?

8 **THE COURT:** Yes, you do.

9 **MS. NORMAN:** Lisa Norman, your Honor, on behalf of  
10 G.T. Leach Builders, a creditor in the bankruptcy case.

11 **THE COURT:** Thank you.

12 I think the most significant thing we have on  
13 calendar, Ms. Chubb, is the motion for order converting the  
14 case, which I'm going to let you proceed with. We also have  
15 the application of the official committee of unsecured  
16 creditors for order authorizing retention of financial  
17 advisors, and, of course, trial setting for the adversary  
18 proceedings.

19 I've read all of the pleadings, and I fairly much  
20 know what I want to do. Of course, there are things up in the  
21 air, and I'm sure I need input of counsel, your arguments; but  
22 what I want to emphasize is that I have read the pleadings.  
23 You don't need to be redundant on the details, but I would like  
24 you to focus on a persuasive argument on both sides emphasizing  
25 the most important points. That will be the most helpful to

1 me.

2 MS. CHUBB: Okay.

3 THE COURT: So, with that reminder and caution.

4 MS. CHUBB: I just wanted to summarize for you  
5 what --

6 THE COURT: Please.

7 MS. CHUBB: -- we will be presenting today.

8 You've previously indicated a readiness to terminate  
9 Asset Resolution as the servicer, and you did terminate the  
10 stay so you could do that.

11 THE COURT: I have already terminated the stay.

12 MS. CHUBB: Yes, you have.

13 THE COURT: Uh-huh.

14 MS. CHUBB: Right.

15 THE COURT: Yeah.

16 MS. CHUBB: And the termination of ARC is under  
17 submission presently.

18 THE COURT: Right.

19 MS. CHUBB: Today we're requesting that if you're  
20 going to terminate ARC as the servicer that you do it before  
21 any conversion. One, it will help us organize our arguments to  
22 you; and, two, it will be a lot clearer to a trustee if a  
23 Chapter 7 trustee gets the estate without those servicing  
24 rights in it. We could end up being where we were three and a  
25 half years ago with a debtor, who now has servicing rights that

1 might be sold again; that would just be quite awful. So, if  
2 you're going to do those things, we would ask that they be done  
3 in that order. We are seeking conversion today of Asset  
4 Resolution from the Chapter 7 -- Chapter 11 to the Chapter 7  
5 case, and Mr. Collins and Mr. Millimet will present that  
6 argument to you.

7 With respect to the conversion of the SPE's, if you  
8 terminate ARC as the servicer today, and that's effective  
9 immediately, and then you can --

10 **THE COURT:** What do the SPE's consist of?

11 **MS. CHUBB:** They are the -- they are the --

12 **THE COURT:** Entities that hold title after  
13 foreclosure.

14 **MS. CHUBB:** Yes. Exactly.

15 **THE COURT:** Formed by Asset Resolution; they are  
16 subsidiaries of Asset Resolution?

17 **MS. CHUBB:** Um --

18 **THE COURT:** What are they?

19 **MS. CHUBB:** I don't know.

20 **THE COURT:** Who owns them?

21 **MR. MILLIMET:** Your Honor, they were actually formed  
22 by Compass back in the time when Compass foreclosed. And the  
23 sole managing member at that time was Compass, which was  
24 eventually assigned, I believe, to Asset Resolution, LLC, and  
25 Asset Resolution, LLC, now constitutes the sole member, which

1 means that they're manager but I don't believe that they are  
2 subsidiaries, per se, of Asset Resolution, LLC.

3 **THE COURT:** So, they're not assets, and I don't need  
4 to characterize in my mind whether a stay is applicable or  
5 anything else; they are separate entities. Are they trusts --

6 **MS. CHUBB:** But they're debtors. They're debtors.

7 **THE COURT:** -- or owned entities by Asset Resolution?  
8 What are they?

9 **MR. KLESTADT:** Your Honor, they're separate LLC  
10 entities, each of which owns one of the foreclosed properties.

11 **THE COURT:** Right. And the members and managing  
12 entities of which are what?

13 **MR. KLESTADT:** Asset Resolution is the managing  
14 member of each of the LLC's.

15 **MS. CHUBB:** It's the owner.

16 **MR. KLESTADT:** But, your Honor, the --

17 **THE COURT:** And the members are --

18 **MR. KLESTADT:** Your Honor, it is --

19 **THE COURT:** You'll get a chance. I just want to get  
20 the background --

21 **MR. KLESTADT:** Asset --

22 **THE COURT:** -- of whether the stay is applicable,  
23 whether the conversion has anything to do with them, or what.

24 **MR. KLESTADT:** Your Honor, Asset Resolution is the  
25 managing member, is the sole member of each LLC, but we

1 recognize, your Honor, that the direct lenders maintain  
2 ownership interests in the properties. So --

3 **THE COURT:** So, in essence, are the direct lenders,  
4 all of the direct lenders -- including Asset Resolution -- but  
5 all the direct lenders members? Does the document say -- is  
6 there a document?

7 **MR. KLESTADT:** There is no document, your Honor, that  
8 says that each particular direct lender is a member or has a  
9 membership interest, but it's --

10 **THE COURT:** How are they formed, then --

11 **MR. KLESTADT:** It's --

12 **THE COURT:** -- under any state law unless there is a  
13 document?

14 **MR. KLESTADT:** Your Honor, as I understand it, they  
15 were formed pursuant to the servicing agreements.

16 **THE COURT:** Is there a document?

17 **MR. KLESTADT:** There is a manage -- there is a  
18 membership agreement, which was --

19 **THE COURT:** Under New York law?

20 **MR. KLESTADT:** I believe under New York law.

21 **THE COURT:** And under New York law an LLC document  
22 must be filed, certainly.

23 **MR. KLESTADT:** Correct.

24 **THE COURT:** And they were filed.

25 **MR. KLESTADT:** Yes. That's my understanding.

1           **THE COURT:** And they're signed only by --

2           **MR. KLESTADT:** Asset Resolution.

3           **THE COURT:** -- Asset Resolution as managing member.

4           **MR. KLESTADT:** May I have a moment, your Honor?

5           **(Pause)**

6           **THE COURT:** I guess the bottom line question is: Do  
7 we all agree that, in essence, title formerly held by these  
8 SPE's is held, basically, in trust by an LLC?

9           **MR. KLESTADT:** The title -- the nominal title is held  
10 by each of the SPE's, yes, by an LLC --

11          **THE COURT:** Uh-huh. Right.

12          **MR. KLESTADT:** -- for the benefit of the direct  
13 lenders.

14          **THE COURT:** So, nobody is claiming that it holds both  
15 nominal title and all beneficial interest.

16          **MR. KLESTADT:** No.

17          **THE COURT:** Everybody agrees it's, basically, title  
18 is held in trust --

19          **MR. KLESTADT:** Correct.

20          **THE COURT:** -- for all direct lenders who --

21          **MR. KLESTADT:** Yes.

22          **THE COURT:** -- at the time of the foreclosure.

23          **MR. KLESTADT:** Yes, your Honor.

24          **THE COURT:** Okay.

25          **MR. MAJORIE:** Your Honor, if I might; with one

1 clarification.

2 Under paragraph seven of the preliminary injunction  
3 it specifically provided that Compass or a single-purpose  
4 entity designated by Compass is authorized to make a credit bid  
5 at the foreclosure sale on behalf of Compass and the direct  
6 lenders, including but not limited to Compass to the extent it  
7 is a direct lender under such loan, with respect to Compass's  
8 and the direct lenders' respective rights as beneficiaries.

9 **THE COURT:** Does that change my summary? We all  
10 agree that basically title is held nominally by these SPE's but  
11 for the benefit of all direct lenders at the time of  
12 foreclosure.

13 **MR. MAJORIE:** With the exception that at least one of  
14 the debtors is also a direct lender, and I just wanted -- that  
15 does clarify, Judge.

16 **THE COURT:** I don't understand the clarification.  
17 Obviously, if Compass was a direct lender at the time of  
18 foreclosure, it's also standing as a beneficiary of the title.

19 Were you attempting to clarify to an extent I don't  
20 understand?

21 **MR. MAJORIE:** I thought I was clarifying that one of  
22 the -- that ARC has an interest in some of these properties as  
23 a direct lender and, therefore --

24 **THE COURT:** The order doesn't provide that, doesn't  
25 conclude or say that you do; it just simply acknowledges for

1 the benefit of all direct lenders including Compass to the  
2 extent it's a direct lender.

3 So, what are you seeking by way of clarification? I  
4 just simply don't understand.

5 **MR. MAJORIE:** Well, to the extent there was a direct  
6 lender interest in Compass, one of the beneficiaries of the  
7 direct lender interests that are now in the SPE's would be one  
8 of the debtors.

9 **THE COURT:** Okay. I can't confirm that or deny that,  
10 but I'll let your statements stand at this juncture.

11 All right. Sorry for the interruption. Go ahead.

12 **MS. CHUBB:** That's okay. I'm sorry for interrupting.

13 But I think still the only person who could act on  
14 behalf of the SPE's presently is Asset Resolution because it's  
15 the only member. So, our concern --

16 **THE COURT:** And, clearly, Asset Resolution is under  
17 this Court's 1334 -- Section 1334 -- in rem jurisdiction.

18 **MS. CHUBB:** Yes.

19 Now, as to the motion to convert the SPE's, if you  
20 terminate Asset Resolution as the servicer today, and effective  
21 right away, and then you were to convert the case to Chapter 7,  
22 we would ask for a continued hearing date on the conversion of  
23 the SPE's so we can go back to the direct lenders and get  
24 51 percent of them to decide what needs to be done. As in  
25 DACA, they, of course, don't want a conversion.

1           **THE COURT:** Okay. I'm not sure I see the need for  
2 that. I mean, you'll hear how I'm going to rule.

3           **MS. CHUBB:** Okay.

4           **THE COURT:** But I see no reason to rule on the one  
5 question before the other. Clearly, as a separate court, as an  
6 Article III court, not sitting in bankruptcy, I have  
7 jurisdiction of the separate cases, bankruptcy cases, but also  
8 the adversary proceedings --

9           **MS. CHUBB:** Right.

10          **THE COURT:** -- and I have pending the motion, various  
11 motions, to declare a termination. Sitting as a bankruptcy --  
12 in bankruptcy, if you will, under 1334, I have the right to  
13 declare a conversion or not declare a conversion, and if I  
14 declare -- and I also have the right to lift the automatic stay  
15 so that in the separate case, if I declare that they are to be  
16 terminated or already terminated, that's effective, and there  
17 is nothing carried over into a separate Chapter 7 that wasn't  
18 terminated or not terminated per my order in the 11.

19          **MS. CHUBB:** That was -- that is true, your Honor. I  
20 was just concerned that a bankruptcy trustee appointed under a  
21 chapter --

22          **THE COURT:** You just have a longer holdup, is all.

23          **MS. CHUBB:** Yes.

24          **THE COURT:** Yeah.

25          **MS. CHUBB:** Just a delay.

1           **THE COURT:** I'll certainly take that into --

2           **MS. CHUBB:** Yes. And even if you terminate and then  
3 convert, think then the Asset Resolution Chapter 7 trustee  
4 would be the manager of the SPE's, at least for a time being,  
5 but as we've just discussed, that's not really property of the  
6 estate because it's held nominally for the benefit of these.  
7 But at least during that hiatus time, if you gave us a  
8 continuance, there would be someone to turn to; it wouldn't be  
9 a vacuum. So, that's why we're asking for that.

10          **THE COURT:** I do want to hear the motion for  
11 conversion today.

12          **MS. CHUBB:** Yes.

13          **THE COURT:** Scheduled a notice today.

14          **MS. CHUBB:** Yeah. Right.

15          **THE COURT:** I want to hear that.

16          **MS. CHUBB:** No --

17          **THE COURT:** And I am undoubtedly going to rule today.

18          **MS. CHUBB:** Okay. If you grant our motions today,  
19 then, to the extent that today's rulings are inconsistent with  
20 the previously entered preliminary injunction, there should be  
21 an order that that preliminary injunction is modified.

22               So, in summary, what we're asking today is for you to  
23 terminate Asset Resolution as the servicer immediately; to  
24 convert the Asset Resolution case from a Chapter 11 to a  
25 Chapter 7; and, depending on what you do, perhaps, or not,

1 continue the SPE conversion motions; set a date for the bench  
2 trial; and if all of that should happen, you'll deny the motion  
3 for a financial advisor for the committee.

4 Thank you.

5 **THE COURT:** Okay. Thank you.

6 May we hear those motions.

7 **MR. COLLINS:** Good afternoon, your Honor. Michael  
8 Collins on behalf of certain direct lenders.

9 We're here and I'll be arguing our motion to convert  
10 and/or appointment of a Chapter 11 trustee. Our first request  
11 is to convert the case to a Chapter 7. If the Court is not  
12 inclined to do so, we request the Court to appoint a Chapter 11  
13 trustee. I noticed this afternoon we got a pleading where, I  
14 think, Asset Resolution now says it doesn't oppose a Chapter 11  
15 trustee if the Court doesn't terminate the servicing. And I'll  
16 let them speak to that, but I did see that. But, your Honor,  
17 our first request and our primary request is conversion,  
18 although the arguments are similar. And I will not repeat the  
19 brief, but I will highlight for your Honor. As we know, under  
20 1112 of the bankruptcy code, it says "includes." Well, you can  
21 -- "you shall" or "you should" convert for cause if it exists,  
22 and it says "includes" and it enumerates a number of causes.

23 The way we look at this case, your Honor, is Asset  
24 Resolution has two assets. It has the servicing rights, which  
25 we believe should be converted -- excuse me -- should be

1 terminated. If that's terminated, there is no ongoing  
2 business. And there is no dispute that they don't service  
3 loans other than the direct lenders loans that have been before  
4 this Court for a number of years. So, there is no other  
5 ongoing business; we've seen no evidence that they intend to  
6 continue servicing loans of other people or other entities.  
7 So, if they are terminated as a servicer of these direct  
8 lenders, there is no ongoing business to rehabilitate or  
9 reorganize. So, therefore, your Honor, we believe, if the  
10 Court grants our request to terminate them, the case should  
11 definitely be converted.

12 They do have a number, at the ARC level, direct  
13 lender interests. We don't dispute that. But as to that,  
14 that's not an ongoing business as far as our argument, your  
15 Honor. That is passive equity interest in various real estate  
16 projects just like the other direct lenders. There --

17 **THE COURT:** And, of course, just as a side point,  
18 under 1334 this Court has in rem and "exclusive" -- the word of  
19 the statute -- exclusive jurisdiction over such --

20 **MR. COLLINS:** Absolutely, your Honor.

21 **THE COURT:** Uh-huh.

22 **MR. COLLINS:** That's our position with that.

23 Absolutely, your Honor; both as to the direct lenders and to  
24 Asset Resolution. Absolutely, your Honor. You do.

25 So, with respect to those passive real estate

1 interests, direct lender interests, there is nothing to  
2 rehabilitate. There is nothing to reorganize. They have made  
3 admissions that we cited in our briefs that they intend to  
4 liquidate; they intend to ask the bankruptcy court, now this  
5 court, to allow them to liquidate sooner than later. And we  
6 don't think as to certain properties that's a proper way of  
7 going forward, but there's no argument that they intend to  
8 reorganize or rehabilitate. They intend to liquidate.

9           So, therefore, your Honor, if we take away the  
10 servicing rights because they're terminated and we just have  
11 left the direct lender interests, there is no reason for this  
12 case to stay in Chapter 11. It can go into a seven or a  
13 Chapter 7 trustee to liquidate their interests. And there may  
14 be certain properties in which they have a majority vote over  
15 51 percent, and they, obviously, can control the vote there.  
16 As to other properties, the Chapter 7 trustee will vote his  
17 interest, just like other direct lenders, and whatever happens  
18 is whether the 51 percent will control unless someone comes to  
19 you with a motion saying, "Your Honor, I need other type of  
20 relief; please ignore that 51 percent for these extraordinary  
21 reasons," but otherwise it doesn't need to be in a 11.

22           Our concern, your Honor, between Chapter 7 and  
23 Chapter 11 trustee is very, very simple. It's administrative  
24 cost. Right now we have a committee, we have a committee  
25 counsel, we have a committee local counsel, and then we have a

1 request for a financial advisor. That's not extraordinary in  
2 Chapter 11 cases, but we think in this case it is, given the  
3 nature of the asset base, of what the property we're talking  
4 about. That is a significant administrative cost.

5           Then you will have a Chapter 11 trustee and his or  
6 her counsel -- which makes sense; they'll be needing counsel --  
7 and they may need a financial advisor. There will be an issue  
8 about whether the debtor will still try to -- now, the debtor  
9 has been displaced, but it may try to seek the higher counsel,  
10 but right now we have three debtors' counsels. Nothing wrong  
11 with that. You know, the debtor is allowed to try to choose  
12 its counsel subject to court approval. But that's a lot of  
13 administrative cost that we believe is unnecessary when you  
14 step back and look at this asset base. So, that's one of our  
15 big concerns with respect to leaving this in Chapter 11 versus  
16 Chapter 7.

17           Two, there may be issues about once a Chapter 11  
18 trustee is appointed, exclusivity goes away, and you may have  
19 Silar trying to confirm a plan; you may have Asset Resolution  
20 trying to confirm a plan; you may have DACA trying to confirm a  
21 plan; you may have the Chapter 11 trustee trying to confirm a  
22 plan. You may have certain of our clients -- we haven't talked  
23 about it, but maybe we'll try to confirm a plan. Again, we  
24 don't think we need that delay and administrative expense.  
25 Chapter 7 trustee can take control of all of that.

1           So, that's basically, in the simplest manner, your  
2 Honor, our position. And why, again, to displace them, your  
3 Honor, just very quickly, because we know you've read the  
4 briefs; here is one of our major concerns.

5           If I may, your Honor?

6           **THE COURT:** Please. Uh-huh.

7           **(Pause)**

8           **MR. COLLINS:** I apologize, your Honor. Maybe  
9 Mr. Millimet will help me. I think we've got it there.

10           Your Honor, the type is not very big. I could hand  
11 you one, too, if you'd like.

12           **THE COURT:** I think I can read it. And you can zoom  
13 it in if you feel it appropriate.

14           **MR. COLLINS:** Your Honor, being practical, we have  
15 benefited by this bankruptcy, because we've gotten a lot of  
16 information. So, as far as the actual bankruptcy filing for  
17 itself, it's actually been a good thing in certain ways because  
18 we've gotten a lot of financial information. But what we  
19 learned, your Honor, if you look before your summary judgment  
20 ruling in July of 2009 -- I think it was early July, 2009 --  
21 Asset Resolution contends to be the servicer, having obtained  
22 the rights from a Compass entity. We have now learned, your  
23 Honor, that Asset Resolution supposedly had an affiliate called  
24 SOS, Servicing Oversight Solutions, perform servicing services;  
25 and then they had Windermere because they needed a local Nevada

1 servicer. And what we found out, your Honor, is prior to the  
2 summary judgment ruling we were seeing monthly payments of 70,  
3 80, maybe high 80's thousand dollars each month. After this  
4 Court's ruling on certain late fees --

5 **THE COURT:** "Payments." You mean recovery of fees.

6 **MR. COLLINS:** Yes. Exactly.

7 **THE COURT:** Uh-huh.

8 **MR. COLLINS:** Amounts paid by Asset Resolution to SOS  
9 for servicing -- services, whatever they may be; somewhere in  
10 the 70 to 90 thousand dollar a month range. This Court's  
11 ruling comes out in early July, and we see the amount spike up.  
12 Over \$4 million is paid after early July up to the date of  
13 bankruptcy. We need an independent trustee to look at that  
14 \$4 million. As the Court is aware, this was a substantial  
15 portfolio years ago, and given time, economic reasons -- and we  
16 think also bad act, but I'm not here to argue those here today;  
17 that's for another trial someday -- the portfolio has gone down  
18 in value. But we see \$4 million go out the door 90 days before  
19 a bankruptcy. We need an independent person to look at those  
20 transactions and say, "Can we recover those for the benefit of  
21 all direct lenders?" That is, we think, an extraordinary  
22 amount of money, especially when compared to somewhere between  
23 70 and 90 thousand dollars a month before that, or over  
24 \$500,000 a month in July, over a million in August; \$4 million  
25 for that time period, your Honor. So -- and that's not

1     disputed.

2             My understanding, your Honor, is today is more on  
3     legal argument; you said, "If I see a fact issue, we'll come  
4     back to have an evidentiary hearing." I don't think there is  
5     any dispute about the existence of these payments. There may  
6     be a dispute about why they were paid, but I'm not asking you  
7     to resolve that today; I'm just saying, "Look at that number as  
8     compared to what it was months before that."

9             So, that's another reason why, your Honor, we need an  
10    independent trustee. By doing so, your Honor, we can move  
11    forward. By this Court's rulings over the summer, we made  
12    substantial progress. We think we can actually expedite that  
13    process going forward by getting a Chapter 7 trustee in to take  
14    over ARC, and from there move forward to trial, hopefully,  
15    maybe, resolve it without aid of trial, but probably may need a  
16    trial, and if we do, the first opportunity the Court gives us  
17    we'll get that done, but we think the conversion of this case  
18    is an essential part to getting these cases over.

19            Your Honor, with respect to that, I'd like to show  
20    you just one more slide. Your Honor, there is -- again, it's  
21    always fun when -- and wonderful when both sides agree on  
22    something. And we did hear this a little bit earlier today  
23    that we both agree that the SPE's are holding certain  
24    properties in trust for direct lenders: my clients, other  
25    people's clients, and for Silar and Asset Resolution to the

1 extent they have direct lender interest. But, your Honor,  
2 they're also holding cash.

3 (Pause)

4 And, your Honor, we know you've read the papers and  
5 you'll see there is a dispute about some \$900,000 and why was  
6 it paid, and when was it paid, and was it trust funds, and was  
7 it money for Pathfinder. But the simple issue demonstrated by  
8 this chart, your Honor, is at the top we show the amounts that  
9 were paid and result as monies due to Pathfinder and certain  
10 servicing fees arising out of the transactions with Pathfinder.  
11 Those are at the top. They're \$835,000 approximately to  
12 Pathfinder; \$92,000, Asset Resolution.

13 But, your Honor, then we have another \$950,000 of  
14 trust funds that we don't know why they went out the door. And  
15 I'm not asking you to resolve that factual question today. All  
16 I'm saying is that's a substantial issue that has to be  
17 addressed, and that's best addressed by an independent trustee  
18 on behalf of ARC looking at that to see what was done.

19 (Pause)

20 Your Honor, really, my argument is that simple. If  
21 you have some questions I could help you with --

22 **THE COURT:** No, thank you.

23 **MR. COLLINS:** Okay. Thank you, your Honor. I'd like  
24 to maybe have a rebuttal, have Mr. Millimet do a short rebuttal  
25 subject to you allowing him to do so.

1           **THE COURT:** Further arguments in favor of the motion  
2 to convert?

3           **(No audible response)**

4           You may respond, please.

5           **MR. KLESTADT:** Good afternoon, your Honor.

6           Your Honor, I gather from your comments you have read  
7 the partial withdrawal of our opposition. Your Honor, I have  
8 been practicing bankruptcy law for nearly 25 years, and one  
9 thing I've learned -- I still have a lot to learn -- but one of  
10 the things I have learned is that I tell my clients to do what  
11 the judge wants to do.

12           Now, your Honor, what does that mean in this case?  
13 If you want a Chapter 11 trustee, your Honor, we have no  
14 objection to a Chapter 11 trustee. I think, intellectually,  
15 your Honor, a conversion in this case doesn't make sense. It  
16 doesn't make sense for a number of reasons. First and  
17 foremost, if you convert the case and there are no operations  
18 of Asset Resolution, who's going to service the portfolio? I  
19 think that's the largest question that's before your Honor  
20 right now. If you terminate the servicing rights today by  
21 virtue of converting the case, who's going to service the loan  
22 portfolio? You're going to be back to where it was, the  
23 situation was at the end of the USACM bankruptcy three and a  
24 half years ago. The attempted remedy there, your Honor, was to  
25 sell and transfer the servicing rights to Compass. I don't

1 want to go into the history of what transpired there; that's  
2 before your Honor in the 892 litigation. But I think, your  
3 Honor, you don't need to decide this motion today, necessarily.  
4 Because Asset Resolution filed for Chapter 11, it can't do  
5 anything. It can't sell property, it can't dispose of  
6 property, it can't encumber property, without coming to your  
7 Honor for permission, under Section 363 of the bankruptcy code  
8 or under the plan processes of Chapter 11.

9 **THE COURT:** Now, you got permission from the  
10 bankruptcy judge in this case to do that on an interim basis?

11 **MR. KLESTADT:** That's correct, your Honor.

12 **THE COURT:** To what extent and how much and against  
13 what?

14 **MR. KLESTADT:** The answer is, your Honor, a  
15 \$1 million interim debtor-in-possession financing facility was  
16 approved by Judge Markell, and the collateral security for that  
17 advance, your Honor, is solely the direct ownership interest of  
18 Asset Resolution. The direct lender interests were  
19 specifically not encumbered by that debtor-in-possession  
20 financing facility.

21 **THE COURT:** And has that money been spent? And where  
22 to?

23 **MR. KLESTADT:** The money has not yet been spent. It  
24 is being funded into my escrow account. I am told by the --

25 **THE COURT:** In other words, it hasn't been funded

1 yet.

2           **MR. KLESTADT:** It is being funded into my escrow  
3 account, your Honor.

4           **THE COURT:** In other words, it hasn't been funded  
5 yet.

6           **MR. KLESTADT:** It has not been funded into a debtor-  
7 in-possession account. Correct.

8           All right. Now, having said that, your Honor, the  
9 DIP lender -- one of the items that was supposed to be on your  
10 Honor's calendar today was the final hearing on debtor-in-  
11 possession financing.

12           **THE COURT:** Right.

13           **MR. KLESTADT:** The lender has said: If a trustee is  
14 going to be appointed, we're not going to fund the case; which  
15 is understandable, your Honor.

16           Now, so, getting back to where I was going, your  
17 Honor, if you terminate today, who is going to service the  
18 portfolio if you convert the case to Chapter 7? That's why we  
19 believe if your Honor is inclined to remove my client as the  
20 debtor in possession, a Chapter 11 trustee makes more sense.

21           A Chapter 11 trustee can step into the shoes of the  
22 debtor, prosecute the litigation in the 892 litigation if the  
23 trustee believes it to be appropriate. I don't know how the  
24 trustee is going to fund that litigation, but that's a separate  
25 issue. But at the same time, your Honor, the tools that are

1 available in Chapter 11 remain available. And Mr. Millimet --  
2 I'm sorry -- Mr. Collins mentioned that exclusivity could  
3 terminate -- will terminate upon the appointment of a trustee;  
4 Silar could file a plan; the direct lenders could file a plan.  
5 But the point is the plan process is available for potential  
6 use by the direct lenders, if joint ventures want to be  
7 proposed, or what have you. That remains available to the  
8 Chapter 11 trustee.

9           In addition, your Honor -- and this has not been  
10 mentioned -- Section 1146 would still be available if you kept  
11 all of the cases in Chapter 11. Eleven forty-six, as your  
12 Honor knows, provides an exemption for the incurrence of  
13 transfer taxes and other taxes if the properties are sold or  
14 transferred pursuant to confirmed plans. Now, the amounts  
15 here, your Honor, I believe are substantial enough that if the  
16 plan process were utilized to transfer properties -- and under  
17 the Supreme Court case in Piccadilly Cafeterias, the plan has  
18 to be confirmed now before the property is sold or  
19 transferred -- I think substantial savings could be realized  
20 for the estate.

21           And the estate, your Honor, the parties, if you will,  
22 include not only the debtor and its creditors, but we recognize  
23 that the direct lenders have an ownership interest. The size  
24 of the pie, your Honor, has always -- the idea has always been,  
25 your Honor, to maximize the size of the pie. Litigation, your

1 Honor, minimizes and reduces the size of the pie. And, quite  
2 frankly, our objective in filing Chapter 11 was to try to bring  
3 a global resolution of all of these issues once and for all so  
4 that all parties could benefit.

5 And that's why, as your Honor recognized at the last  
6 hearing, we initiated the declaratory judgment action, so that  
7 the plenary jurisdiction of the bankruptcy court, and now this  
8 court by virtue of the withdrawal of the reference, could be  
9 utilized so that you could bring order to the situation and  
10 implement a judgment, depending on what your judgment is, your  
11 Honor, that will bind all of the direct lenders. There are  
12 parties that are not represented by Bickel and Brewer; there  
13 are only 46 named plaintiffs, as I understand, in the 892  
14 litigation. With the filing of the declaratory judgment  
15 action, your Honor, you now have the opportunity and ability  
16 to -- and, hopefully, as I think through the Chapter 11  
17 process, to confer some order into the situation.

18 Your Honor, Mr. Collins said that there was progress  
19 that was made previously. I understand, your Honor, previously  
20 there was substantial litigation with regard to two of the  
21 properties, the Gess property and the Anchor B property. I  
22 think, your Honor, by the cases remaining in Chapter 11, as  
23 opposed to a conversion to Chapter 7, it's more likely that the  
24 different issues surrounding each of the different  
25 properties -- and I understand that the direct lenders are not

1 identical in each of the properties; there are different groups  
2 of lenders for each of the properties. Those properties can be  
3 addressed on a lender-by-lender basis.

4           Your Honor, if you convert the case to Chapter 7 and  
5 there's no funding available for a Chapter 7 trustee, what's  
6 the Chapter 7 trustee likely to do? I think he's likely to  
7 abandon the estate's interest, which is direct ownership  
8 interest of Asset Resolution at this point, and simply walk  
9 away from everything, because there will be nothing to  
10 administer. Well, where does that leave you? It leaves you  
11 back in the situation where there's no servicer. I don't know  
12 who benefits from that, your Honor, but I don't think the  
13 direct lenders at large will benefit from that situation.

14           Is it possible for them to organize and to appoint a  
15 servicer? Well, we have been asking for the direct lenders to  
16 give us names of a servicer. My client, your Honor, doesn't  
17 want the servicing rights. We are an involuntary party here by  
18 virtue of what happened with Compass and the foreclosure of  
19 Asset Resolution of its security interests in Compass's  
20 portfolio. But my client doesn't want to service the loans.  
21 We've asked the direct lenders to give us names. The only name  
22 that was provided was Cross. Your Honor, if that's what the  
23 direct lenders want to do and if that's what your Honor thinks  
24 is in the best interests of the direct lenders and creditors,  
25 we're happy to turn it over. But I don't think, your Honor,

1 that can be accomplished in Chapter 7.

2           Your Honor, the other issue I think you need to focus  
3 on is the scheduling of trial in the 892 litigation. I am new  
4 to the scene by virtue of the commencement of the bankruptcy  
5 case. I was not part of the 892 litigation up until this  
6 point. There are other counsel that have been, so if I make  
7 any misstatements, I'll ask that your Honor forgive me and that  
8 they be corrected. But I did not understand that your Honor  
9 was prepared now to terminate the servicing of Asset  
10 Resolution. I know there are motions before the Court. I also  
11 know that your Honor has been speaking of scheduling both a  
12 bench trial and a jury trial to address various issues,  
13 including tort issues. If your Honor rules on this motion now  
14 and appoints either a Chapter 11 trustee or a Chapter 7 trustee  
15 and removes my client, you're effectively denying, I think, the  
16 ability of Asset Resolution to prosecute its affirmative claims  
17 and defend itself.

18           Your Honor, Asset Resolution may be entitled to  
19 substantial fees, or it may not. But given that your Honor has  
20 been insisting on trying the case as soon as possible, your  
21 Honor would be tying either one or both hands of Asset  
22 Resolution behind its back by appointing a trustee at this  
23 point. I think, your Honor, my client and Silar -- and I'll  
24 ask Mr. Majorie to correct me if I'm wrong -- would be prepared  
25 to have your Honor try the case in late March or early April --

1 we're now in mid-January -- to have discovery finished and to  
2 go forward with the trial as soon as possible. During that  
3 time period, your Honor, nothing else needs to be done in the  
4 bankruptcy case if you keep the case in Chapter 11. You could  
5 even keep my client, your Honor, in position as debtor in  
6 possession. Why? Because we can't do anything, your Honor,  
7 with regard to the properties because we've started the  
8 bankruptcy case for Asset Resolution and for the SPE's, while  
9 the case is in Chapter 11, without coming to your Honor for  
10 approval.

11           So, you could resolve, your Honor, the issue of what  
12 is in the estate. Does Asset Resolution have a seven figure  
13 entitlement to servicing fees? Does it have a six-figure, or  
14 does it have zero? You can resolve that, your Honor, keep the  
15 rest of the bankruptcy case in status quo; and then, once your  
16 Honor has decided what Asset Resolution is entitled to, then  
17 pick up where we are now and determine whether a plan process  
18 makes sense or whether a Chapter 7 makes sense. But if your  
19 Honor were to decide to appoint a trustee now, I think that you  
20 would be depriving Asset Resolution of the ability to properly  
21 defend itself and it would be detrimental to the estate, your  
22 Honor, at the end of the day, because there are creditors at  
23 the Asset Resolution level and the SPE level, and I'm sure that  
24 Mr. Kinel on behalf of the creditors committee will have  
25 something to say about that.

1           Your Honor, as to these points raised by Mr. Collins  
2 on the servicing fees paid to Servicing Oversight Solutions,  
3 none of the direct -- as I understand it, none of the direct  
4 lender monies were used for those payments. Silar made an  
5 equity infusion into Asset Resolution, and those funds were  
6 used to pay for the servicing fees. I don't see that as an  
7 issue, your Honor, at this point with regard to whether or not  
8 that constitutes a cause for the appointment of a trustee at  
9 this stage. They were pre-petition events, no payments have  
10 been made to this point, no payments can be made except upon  
11 approval by the bankruptcy court either pursuant to retention  
12 applications for the professionals or the DIP budget as  
13 approved by Judge Markell at the last hearing.

14           As to the Pathfinder transactions, your Honor, my  
15 understanding is there are explanations and justifications for  
16 what was done, and that could be addressed at an appropriate  
17 time. I don't believe that that's evidence at this point. My  
18 understanding this was a preliminary hearing, and you're not  
19 going to entertain any evidence today.

20           Unless your Honor has any other questions for me --

21           **THE COURT:** Okay. Thank you.

22           **MR. KLESTADT:** -- I think I've said everything I need  
23 to say.

24           Thank you, your Honor.

25           **THE COURT:** Further argument, please.

1           **MR. KLESTADT:** Your Honor, one more point if I may.  
2 I apologize.

3           In the motion papers there are references to the  
4 operating reports for the various debtors not being filed.  
5 They were filed today, your Honor, to the extent that we were  
6 able to complete them, for the SPE's, I think for the Asset  
7 Resolution entity; they're being finalized. The delay in  
8 filing these, preparing these, your Honor, was in part due to  
9 the transfer of the case from New York to Las Vegas, and then,  
10 your Honor, we had to get our accountants engaged, a retention  
11 application was approved in late December; we're now mid-  
12 January. They were filed today, and they're on the docket.

13           **THE COURT:** Thank you.

14           **MR. KLESTADT:** Thank you, your Honor.

15           **(Pause)**

16           **MR. MAJORIE:** Thank you, your Honor. Mr. Majorie. I  
17 appreciate the opportunity to join the fray, I guess is maybe  
18 the right word. I do represent Silar.

19           I think counsel for the certain direct lenders only  
20 identified two assets. I think there are more than two assets  
21 here. There's the claims for interference. There's also the  
22 claims for servicing fees. There are two, really, two subsets  
23 of those claims. One are the accruing fees issue, which I  
24 understand your Honor spent a lot of time on in the Gess  
25 hearings. The second is the accrued fees which were purchased

1 at the time of the bankruptcy, or of the sale pursuant to the  
2 confirmation order. Those were accrued fees. There were  
3 really only several -- there are only a few objections to the  
4 identification of those accrued fees, no one else objected, and  
5 it would be our position that those accrued fees are a  
6 substantial asset of this estate, notwithstanding whether there  
7 are accruing fees subsequent to that. So, even if your Honor  
8 were to apply the Gess formula, there is a substantial question  
9 going to be in either the 892 or the DACA action, the adversary  
10 proceeding, as to the purchase of those accrued fees and the  
11 impact of the interference on the value of those assets.

12           With respect to the unnecessary administrative costs,  
13 counsel for ARC indicated, you know -- I think it is accurate  
14 to say that there could be essentially the status quo  
15 maintained while there is a litigation of the ultimate issues  
16 with respect to what it is that ARC owns or doesn't own and who  
17 owes what to whom with respect to the direct lender claims.

18           I would point out to your Honor that with respect to  
19 the payments to SOS and the cash dispute that Mr. Collins  
20 referred to, a Chapter 11 trustee could certainly examine  
21 those. Those by themselves, Mr. Collins I think has indicated,  
22 there are fact questions going to what types of payments, why  
23 were they made, et cetera. The existence of those payments  
24 certainly could be examined either by an examiner, by the  
25 creditors committee without a Chapter 11 trustee, or a Chapter

1 11 trustee. So, I don't think that the existence of those two  
2 facts that Mr. Collins says are undisputed by themselves  
3 warrant a conversion in this case.

4           What I really would like to focus on, Judge, and  
5 emphasize and highlight a little more is the question: If  
6 there is a conversion, what really happens? I'm very -- I  
7 understand I'm late to many of the proceedings, but I have read  
8 as many transcripts as is humanly possible and orders as is  
9 humanly possible. I recognize your Honor's dilemma in the Gess  
10 case where your Honor at one point figuratively threw up your  
11 hands, at least in the transcript, and said, "I don't know who  
12 I can trust. I can't trust Silar or ARC, I can't trust the  
13 direct lenders, and I don't know who I can trust." Certainly a  
14 Chapter 11 trustee would give your Honor the ability to trust;  
15 to trust the information that you are getting so that you can  
16 hear on the merits and not be concerned, as a fact finder, is  
17 there an ulterior motive about this, is there an ulterior  
18 motive about that. The trustee can bring a level playing field  
19 to what was a two-party dispute but is now really a matter  
20 involving several thousands of other people, and probably had  
21 involved several thousands of other people even way back in the  
22 Gess days when your Honor was making rulings which impacted the  
23 loan servicing rights and relationships of people who weren't  
24 before the Court and who were clearly being impacted by those  
25 resolutions.

1           When I take a step back and started to study about  
2 direct lender interests on hard money loans, the 51 percent  
3 rule really creates a difficulty, I think, for your Honor and  
4 for the various participants in these transactions. The  
5 51 percent rule in both the Gess scenario and in the Anchor B  
6 scenario kind of highlights the problem. In Gess, and as  
7 Ms. Chubb indicated, there is a need to go and solicit, if  
8 that's the right word, 51 percent, and once you reach the  
9 threshold, you don't need to talk to anybody else. That's a  
10 model that is usually followed in a close corporation context  
11 where the parties know each other and where they can vote with  
12 each other even though they don't include the other  
13 constituencies because there is a proximity of relationship  
14 there.

15           In a public corporation context, which this is much  
16 more akin to, you have disparate people all over the country  
17 who made investments based upon whatever their own decision-  
18 making was, who are now finding themselves tied to people they  
19 don't know over properties they probably have never seen and  
20 are subject to this creeping consent process, which essentially  
21 means that as long as somebody, like the Cangelosi group did  
22 early in the case, tries to get 51 percent, the other 49  
23 percent never have their day, because they don't even -- it's  
24 not even as if they get to vote no. They get no vote at all;  
25 because under the conversion scenario where they're basically

1 left to the vagaries of where they were post-confirmation in  
2 USA, what you wind up with is people who have direct lender  
3 interests who will be told that 51 percent voted this way, and  
4 this is what's happening to your interest in this particular  
5 property, and they can't do anything about it.

6           The neat thing and the really valuable thing about a  
7 Chapter 11 proceeding is that it can stop now. The valuable  
8 part of a Chapter 11 proceeding is that through the plan  
9 process the LSA's can all be altered in a way that the direct  
10 lenders want and apply to the other direct lenders that don't  
11 even have LSA's that no one can find so that there is a level  
12 playing field for a new servicer to come in and actually know  
13 what he's bidding on and actually know what the rules of the  
14 road are. The bankruptcy process would allow -- and I have a  
15 lot of respect for Mr. Collins; I used to -- a long time ago,  
16 was at Bickel and Brewer -- but I beg to differ. There's a lot  
17 of reasons why there should be competing plans. There are a  
18 lot of reasons why a Chapter 11 is a good idea, because all of  
19 the relevant constituencies can then use the mechanisms  
20 available in a Chapter 11 to create what should have been  
21 created -- and I think in Gess your Honor said it at one point;  
22 the inherent problem was that under the USA operating business  
23 plan this was a problem, and under the confirmation plan this  
24 problem of what do you do about the servicer, what do you do  
25 about the loan -- advanced servicing advances or capital calls;

1 those problems were never resolved in the USA bankruptcy. They  
2 can be resolved here.

3 And, therefore, Silar's position is we understand  
4 your Honor's view expressed in Gess that in that bi-party  
5 dispute you really weren't sure who to trust, and you said at  
6 line 21, page 23, "I can't trust Silar or Asset Resolution, and  
7 I can't trust the direct lenders." That's because we are  
8 heavily litigating positions in a case. But we are now in a  
9 Chapter 11, and we ask your Honor to keep it in a Chapter 11 so  
10 that an independent person can come in, can examine where the  
11 matters lie, and if they determine that it's not proper to be  
12 in an 11, then they can make a motion to convert, which,  
13 obviously, your Honor can hear.

14 If you convert the case today, you are leaving the  
15 other direct lenders with no voice. You're making it -- most  
16 likely what will happen is what we've already seen in Gess.  
17 There will be a joint venture; the properties will go to tax  
18 foreclosure. There's over, I think, \$20 million or so of  
19 property taxes on these properties. Nobody can pay them,  
20 apparently. There's going to be a property tax foreclosure.  
21 At the property tax foreclosure some joint venture, probably,  
22 comprised of some direct lender group, probably, will go and  
23 bid and buy the property cheap at the tax foreclosure. Unlike  
24 in Gess, that joint venture won't have to include all the other  
25 direct lender interests who would get the put option to

1 actually sell out or ride, which your Honor crafted in the Gess  
2 hearings. That protection can be given in a plan. It can't be  
3 given in a seven. And we, therefore, ask that your Honor not  
4 convert the case at this time and that you appoint a Chapter 11  
5 trustee so that you can have the confidence that there are  
6 independent eyes, giving you independent information, and then  
7 let the relative -- the respective parties argue their  
8 positions, but you will have the benefit of that level playing  
9 field trust factor for a Chapter 11 trustee.

10 In brief, Judge, if you convert it today, you are  
11 giving -- you are creating more problems for the people that  
12 were victimized a long time ago when they bought these  
13 interests, and we would ask that you give them an opportunity;  
14 you give Silar an opportunity; you give the certain direct  
15 lenders, which there are only four here today, an opportunity  
16 to submit plans that could be the basis of ultimately a  
17 consensual arrangement which will give what everybody wants in  
18 this world, to the extent you can get it: one resolution, one  
19 time, applicable to all the constituent interests.

20 And I would just, in closing, say one other -- point  
21 out one other thing, your Honor. The certain direct lenders  
22 represent more than the four people who are the movants. And I  
23 was here last hearing, and I heard your Honor indicate that  
24 whether they're good people or bad people or what their motives  
25 are is irrelevant to your consideration of the present motion.

1 And I hear that, and I'm not here to discuss the relative  
2 merits or character or intent or anything else of those people.  
3 But what is important to note is this, I believe. There is --  
4 the movants would like to suggest that 51 percent of the direct  
5 lenders are asking you for this relief. Ms. Chubb honestly  
6 acknowledged that she doesn't have that 51 percent  
7 authorization today. So, your Honor is really moving to  
8 convert or would be converting on the basis of four direct  
9 lenders who don't hold anywhere near 51 percent. And I'm  
10 simply asking your Honor to protect the people who would  
11 comprise the other percentage, the 95 percent or so, that are  
12 not here today, and allow the Chapter 11 process to go forward  
13 with a trustee.

14 Thank you for the opportunity.

15 **THE COURT:** Thank you.

16 Other argument opposing conversion?

17 **MR. KINEL:** Good afternoon, your Honor. Norman Kinel  
18 on behalf of the creditors committee.

19 I guess I have to confess that I have been practicing  
20 bankruptcy law for a year longer than Mr. Klestadt, 26 years,  
21 and this is indeed one of the stranger cases that I've come  
22 across and been involved in. I think it would be fair to say  
23 that these bankruptcy cases are stillborn. They started about  
24 three months ago and have been bouncing around between  
25 different courts, different jurisdictions, the reference was

1 recently withdrawn; we're here now on a motion to convert or  
2 appoint a trustee. And it's somewhat perplexing to the  
3 committee as to why it seems that this debtor, unlike the, I  
4 don't know, hundreds of other cases that I have been involved  
5 in, if not thousands, doesn't seem to be entitled to have its  
6 day in court, and that being bankruptcy court, which this court  
7 is now sitting as, at least in part, and have an opportunity to  
8 either reorganize or liquidate as the case may be.

9           There is nothing extraordinary about a business that  
10 may or may not have significant ongoing operations but clearly  
11 does have assets, clearly does have litigation claims, being in  
12 a Chapter 11 proceeding. It's almost as if the movants have  
13 turned the bankruptcy code on its head. It's not the debtor  
14 who has to establish cause for being in Chapter 11 or for not  
15 having a trustee appointed; it's the opposite. And the only --  
16 there really is no evidence in a formal sense before the Court,  
17 but even the scant documents that were put before your Honor  
18 today, they may raise some questions, but there certainly have  
19 been no answers. And that's one of the jobs of a creditors  
20 committee, and that's the job that we intend to fulfill and  
21 pursue, as we said in our papers. If there's anything that was  
22 done improperly before the case or during the case, obviously,  
23 we're here to police that. Our impression is that money was  
24 paid pre-petition to a subservicer, but it was money that was  
25 an equity infusion; it wasn't money taken from any direct

1 lender. So, we're not really sure what that is intended to  
2 show.

3           Your Honor, something else that struck me as I sat  
4 there earlier; the creditors committee, and I don't think any  
5 party in interest was on any kind of notice that there's even  
6 the remote possibility that the Court, sitting as the district  
7 court, could make a decision today terminating the servicing  
8 rights of Asset Resolution. We understand that's the subject  
9 of a litigation that's pending before the Court, but there has  
10 been no notice of any hearing where that could be the outcome.  
11 If there was, the creditors committee certainly would have  
12 spent time looking into that and responding.

13           So, we're a little confused. It seems that the cart  
14 is before the horse here. It seems that the burdens of proof  
15 and the burdens of persuasion have been turned on their head  
16 and that this debtor, who really hasn't done a thing since it  
17 filed for Chapter 11 except engage in some turf wars -- and  
18 we're not necessarily -- I mean, we have -- the committee has  
19 taken sides to the extent that -- not because it necessarily  
20 believes the debtors have done the right thing in the past or  
21 even will do the right things in the future. We don't know;  
22 it's premature. But we do firmly believe that the debtors  
23 haven't been given any opportunity to do anything. They've  
24 been just attacked repeatedly since the Chapter 11 was filed,  
25 and, of course, much litigation incurred before the Chapter 11

1 were filed.

2           Even the fact that the debtors now seem to consent to  
3 the appointment of a trustee is somewhat perplexing, although I  
4 think we understand -- the committee does -- that there is a  
5 sense of battle fatigue at this point, in that if the Court,  
6 given the Court's history, doesn't have confidence in the  
7 debtors, and the Court's in a better position than the  
8 committee is at this point to make those kinds of judgments  
9 without any evidence being before the Court, then perhaps that  
10 is the -- a middle ground that could serve everyone's  
11 interests.

12           But to convert the cases, your Honor, I mean, I  
13 haven't heard or seen or read a shred of evidence or a shred of  
14 rationale other than as a litigation tactic, which would really  
15 just wipe the debtors essentially out and their interests and  
16 leave the certain direct lenders with no real adversary, no one  
17 to contest the claims that they're going to make, no one with  
18 any funding to be able to stand up in court and protect the  
19 interests of the other direct lenders and the other creditors  
20 who exist in large number.

21           And in terms of administrative costs, your Honor,  
22 especially if a trustee is appointed, the committee intends to  
23 be active and can look into whatever transactions need to be  
24 looked into; can be the proponent, potentially, of a plan; can  
25 be, hopefully, some -- an entity that can help resolve disputes

1 and not create more disputes. But it's very dispiriting to  
2 those who I represent, and that includes in part the certain  
3 direct lenders here today, that all we've done for three months  
4 is engage in this kind of, you know, who can knock the other  
5 off their balance rather than trying to create solutions to a  
6 problem.

7           And if a Chapter 11 trustee is appointed, the  
8 committee would eagerly work with that individual if that's  
9 what the Court sees as necessary. Our papers were to the  
10 effect that we didn't think that either was necessary at this  
11 point. I don't think the debtors necessarily are asking that a  
12 trustee be appointed. I think they feel that if that's what  
13 the Court wants to do, they're not going to oppose it and  
14 they're not going to spend the time and the effort and the  
15 money in trying to put out an evidentiary hearing to dissuade  
16 your Honor of that -- from making such a ruling.

17           But, your Honor, I think the committee is very  
18 concerned that the interests of creditors generally are being  
19 lost or could be lost or subsumed in this litigation that's  
20 gone on for years; and Asset Resolution does have significant  
21 assets, and I don't think anybody could dispute that. And  
22 whether or not they have an active, ongoing servicing business  
23 or not is irrelevant. There are individuals who are in  
24 Chapter 11 who have no active ongoing business. There are  
25 other businesses that were no longer active. There are

1 numerous Chapter 11 plans that have been confirmed for entities  
2 that no longer were operating businesses. So, if that's all  
3 the certain direct lenders can tell your Honor today, that --  
4 and this is all based on the premise that your Honor is going  
5 to make a ruling today that's not even teed up before your  
6 Honor with respect to make today. And if it is, then something  
7 really got lost in the presentation of this motion or what was  
8 on the Court's calendar today.

9           So, on behalf of the committee, your Honor, we would  
10 respectfully request that the Court deny the motion and give  
11 the debtors at least some opportunity to try to do something,  
12 and if they don't do it appropriately or they don't do it  
13 promptly or timely or with good faith, there will be ample  
14 recourse to -- by virtue of your Honor, the creditors  
15 committee, the other parties who are participating in this  
16 case -- if the trustee -- if your Honor feels that that's the  
17 way to go, certainly that will increase administrative costs,  
18 but we would certainly respect that decision.

19           Conversion, your Honor, we think should be out of the  
20 question. There is no basis for converting these cases, we  
21 respectfully submit. There is no evidence; there is no  
22 support; no one has been given a chance to try to make some --  
23 enable maximization of assets and to try to obtain a recovery  
24 for unsecured creditors in these cases, and to convert really  
25 will have prevented anyone from even attempting to do so.

1 Thank you.

2 **THE COURT:** Thank you very much.

3 **MR. KINEL:** Thank you, your Honor.

4 **THE COURT:** Other arguments opposing conversion?

5 (No audible response)

6 All right.

7 **MR. KIRBY:** Your Honor, Dean Kirby on the telephone.

8 I can't see if there are other people in the courtroom ready to  
9 speak. So --

10 **THE COURT:** There are not. Opposing conversion,  
11 please.

12 **MR. KIRBY:** Yes, your Honor. The opposition that I  
13 filed on behalf of DECA only pertains to Fiesta Stone Ridge.  
14 Our clients do hold 57 percent of the direct lender interest in  
15 Fiesta Stone Ridge which is one of the SPEs, as they're called.  
16 My clients have been proactive and successful in finding a  
17 solution for that property and in connection with our  
18 opposition, we filed with the Court a signed term sheet with a  
19 joint-venture partner Capstone prepared to invest 4 and a half  
20 million dollars.

21 The financing exists to pay -- repay the advances, to  
22 pay servicing fees under the Gess formula, to pay dissenting  
23 direct lenders based on a 5 and a half million-dollar valuation  
24 of that property which rather greatly exceeds the 3 and a half  
25 million-dollar sale proposed out of Court by Asset Resolution.

1 All we want is to implement that solution as quickly and  
2 cheaply as possible and to us, appointing a trustee or  
3 converting this particular SPE, Fiesta Stone Ridge does not  
4 further that goal. That's all on the one hand.

5 I will say that in attempting to negotiate a plan  
6 with Counsel for this Debtor in Possession, the SPE, we find  
7 ourselves negotiating over just one thing and that is how Asset  
8 Resolution's claim is to be treated. This is wrong and  
9 inappropriate. Asset Resolution is a fiduciary to the direct  
10 lenders not because of any bankruptcy that's been filed but  
11 because there's a loan servicing agreement and Asset Resolution  
12 under the loan servicing agreement is bound to follow the  
13 instructions of 57 percent of the direct lenders but Asset  
14 Resolution looks teed up to be not part of the solution but  
15 part of the problem here.

16 And so, no, don't convert this SPE case to Chapter 7.  
17 Don't appoint a trustee for this SPE. That's simply going to  
18 raise expenses and complicate matters. Let us go forward to  
19 propose a plan based on the joint venture. I find it  
20 interesting, for example, that the arguments that have been  
21 made say, well, the other direct lenders not constituting a  
22 majority will be left out not under any plan that would pass  
23 muster in bankruptcy that I know of and the dissenting rights  
24 that, you know, we're proposing certainly pattern those allowed  
25 in Gess and are entirely appropriate and protective.

1           Also we've heard the idea of competing plans being  
2   touted as being some mechanism for protecting the direct  
3   lenders but I think there's a motion to extend exclusivity  
4   pending all because Asset Resolution really does not want to  
5   relinquish control of these bankruptcy cases mainly because  
6   what Asset Resolution really wants to do is to sell these  
7   properties for whatever they can get for cash and then litigate  
8   about the cash until -- well, until a very long time.

9           Those problems, we believe, can only be solved by  
10   either terminating Asset Resolution as the loan servicing agent  
11   or converting or appointing a trustee as to the Asset  
12   Resolution bankruptcy case itself. Thank you.

13           **THE COURT:** Thank you. Other arguments opposing  
14   conversion? Thank you. I pretty well know what I want to do.  
15   I am going to immediately convert. This is a speaking order.  
16   I'll ask for an order in written form embodying the Court's  
17   order but this is a speaking order and effective immediately.  
18   I will convert forthwith and ask the U.S. Trustee to appoint a  
19   trustee.

20           I'm a little incredulous. While both sides have  
21   argued relevant factors, you have totally ignored the forest  
22   for some of those relevant trees. So the Court will answer  
23   your question and delineate fully what there is and what there  
24   is not to organize or reorganize in a Chapter 11.

25           First, a little bit about the history. There, of

1 course, was in USA Commercial a reorganization confirmed.  
2 Judge Regal, pursuant to the reorganization, sold the servicing  
3 rights. Compass purchased those rights. Silar financed, if  
4 you will, that purchase. Judge Regal specifically made  
5 findings that these servicing rights were not executory  
6 contracts in the sense required by Section 365 to be cured,  
7 that is, there was nothing that the Debtor had to do to cure  
8 these servicing rights, that such as they were, they passed  
9 through the bankruptcy. The direct lenders had their same  
10 rights. They had their same rights to terminate whatever those  
11 rights were and their same rights to look to the servicer,  
12 whoever that may be as a fiduciary under Nevada law or the law  
13 of any appropriate jurisdiction relative to those notes and  
14 deeds of trust.

15 Compass took the first initial step both in  
16 Bankruptcy Court and then in filing cases in the Federal  
17 District Court to enforce its rights of purchase and quiet  
18 title, if you will, vis-à-vis the threatened actions of  
19 Cangelosi and others to terminate those rights. Judge Regal  
20 entered an order containing preliminary conjunctive relief and  
21 this Court later upon request entered a preliminary conjunction  
22 attempting to preserve the status quo.

23 Now, this is the important part. This Court has a  
24 history -- this case has a history of depriving and defrauding  
25 over 6,000 investors of millions of dollars worth of interest.

1 There's a gentleman who's just attempted to plead guilty, of  
2 course, to participating in fraud and the Debtors -- aside from  
3 the fraud that he's consented to plead guilty to, the Debtors  
4 were also accused both in the plan and in Judge Regal's  
5 confirmation and findings of basically misappropriating funds.

6 They did it in several ways. They did it in  
7 primarily causing the Debtor USA Commercial to go into an out-  
8 of-trust position. They continued to make payments to  
9 investors, direct lenders when payments were not forthcoming  
10 from a borrower. The way they did it is, of course, by out-of-  
11 trust situations in the escrow that they should otherwise have  
12 been required to maintain. One way, for example, that they  
13 accomplished that is by taking payments and payoffs on notes  
14 and deeds of trust of other investors and without the knowledge  
15 of such direct lenders, applying it not to those proper  
16 recipients but instead to the ongoing payments. There are  
17 other ways, of course, that they caused the trust to be out of  
18 trust including some fraudulent activities that are the subject  
19 of the criminal proceeding.

20 There were over 6,000 direct lenders, millions of  
21 dollars, as we learned in the Gess loan. What was that,  
22 originally -- how many millions of dollars?

23 **MR. UNIDENTIFIED:** Twenty-six and a half.

24 **THE COURT:** Twenty-six million-dollar loan, just that  
25 one property alone. With that background in mind, this Court

1 made it very clear to both sides how I intended to maintain the  
2 status quo. On the one hand, I cautioned Cangelosi as she  
3 stood here personally represented by Counsel. I will not  
4 tolerate your unilateral subversion or taking of the servicing  
5 rights which were validly sold in the Bankruptcy Court. I will  
6 not tolerate that. She, by her conduct, indicated pretty clear  
7 intent in course of conduct to subvert and walk around the  
8 Court's order and so I took appropriate remedy to stop that.

9 In the same breath and at the same time, I cautioned  
10 Compass. Silar was standing here with their ear cocked  
11 listening. They were parties. You will not be permitted to  
12 further rape -- and I apologize for using the term. It's the  
13 only term I can use to describe this situation in light of  
14 Compass' prior conduct and USA Commercial's prior conduct  
15 primarily. You will not be permitted to further rape or  
16 pillage the direct lenders and investors. There was at the  
17 time, of course, reputed evidence that the insiders of Compass  
18 had specifically said, "We're entering into this transaction  
19 for the purpose of garnering these assets that belong to the  
20 direct lenders and we're going to do it to our benefit."

21 I reminded Compass -- Silar standing with their ear  
22 cocked listening -- in open court, you are a fiduciary. You  
23 have servicing rights. I'm going to protect you in those  
24 rights. At the same time, you must act as a fiduciary on  
25 behalf of all direct lenders, not on your own behalf. I

1 clearly cautioned them. I think that was obvious anyway but I  
2 clearly cautioned them in that hearing and in a number of  
3 hearings.

4           It now is apparent that just like Cangelosi, they  
5 intended to walk around the Court's jurisdiction. As long as  
6 this Court was protecting their interest, they sought to their  
7 benefit to permit this Court's orders. For example, I said on  
8 a number of occasions, I believe I have in rem jurisdiction  
9 over the servicing rights. I certainly said I have in rem  
10 jurisdiction over the assets that Cangelosi was trying to  
11 acquire from direct lenders and I believe I also said I think I  
12 have in rem jurisdiction over these servicing rights since they  
13 are the subject of the lawsuit. That doesn't mean I took title  
14 to them but I believed I have -- I believed that I had in rem  
15 jurisdiction over those servicing rights. I stated that on a  
16 number of occasions. Again, Silar stood here with ear cocked  
17 listening and without objection.

18           Then in relation to the Gess loan, as I made -- began  
19 to make rulings that were contrary to Silar's position, Silar  
20 constructed or imagined a way to waltz around the Court's  
21 jurisdiction, my asserted in rem jurisdiction. First, they  
22 transferred these assets to Asset Resolution, the assets they  
23 held basically as collateral while Compass was still in  
24 possession. I realize now although I suspected at the time  
25 that the true motivation -- and I doubt there will be much

1 disagreement -- was to protect Silar from taking direct  
2 possession of potentially toxic assets while at the same time  
3 preserving the value to Silar as collateral. They conveyed  
4 these assets to Asset Resolution. That is the servicing rights  
5 that it -- collateral interest in the servicing rights in the  
6 direct lender interests.

7           And then somewhere down the road when, again, the  
8 Court's rulings began to be onerous to Silar, somebody  
9 counseled Asset Resolution to enter into a Chapter 11 filing.  
10 There was nothing to reorganize. There were no separate  
11 creditors, separate and apart from creditors Asset Resolution  
12 had accrued at the request of Silar, of course, other than,  
13 perhaps, the servicing -- the rights to servicing  
14 reimbursements for expenses out of pocket in protecting the  
15 assets which they were servicing.

16           Otherwise, the creditors they accrued were Counsel  
17 fees, professional fees and fees basically in litigating with  
18 the direct lenders. This Court made clear at a number of  
19 junctures including in respect to the Gess loan that that was  
20 out of their own pocket. It certainly couldn't be charged at  
21 the feet of all the direct lenders including themselves as  
22 direct lender.

23           Nevertheless, somebody counseled that the way to  
24 avoid this is to get the assets out of the hands of the Federal  
25 District Court. Let's put it into a Chapter 11. That gets it

1 in front of another judge and of course as it works out now,  
2 that did not work. The venue was transferred back here to  
3 Las Vegas, Nevada District Court and this Court withdrew the  
4 reference and this Court clearly now has, if it didn't already  
5 have before by virtue of its declaration of in rem jurisdiction  
6 -- it now has clearly 1334 exclusive jurisdiction over these  
7 assets, the servicing rights and the direct lender interests  
8 owned now by Asset Resolution and, of course, not the exclusive  
9 jurisdiction over the assets owned by SPEs but exclusive  
10 jurisdiction over the managing member of each and every one of  
11 those SPEs, that is Asset Resolution.

12 Basically what Silar and Asset Resolution were doing  
13 was waltzing again around -- just like Cangelosi, waltzing  
14 around this Court's jurisdiction over those assets. You are  
15 doing exactly what I told you not to do. Do not further rape  
16 or pillage. Do not violate your fiduciary duties to the direct  
17 lenders. I expect to hold the principals of Asset Resolution  
18 and Silar, the entities themselves and any attorneys or  
19 professionals who counseled this frivolous -- under Rule 11 of  
20 the Federal Rules of Civil Procedure, this frivolous endeavor  
21 -- I expect to hold you personally liable for the Rule 11  
22 appropriate sanctions and I will expect to see those motions.

23 That's the forest. That's the forest. There is  
24 nothing for Asset Resolution to properly reorganize. Asset  
25 Resolution was devised from the outset as a shell entity to

1 protect Silar from liability for holding and preserving the  
2 value of these servicing rights. That's what it was devised  
3 for. It wasn't -- it didn't predate this series of cases. It  
4 didn't have an existing business. It was devised solely for  
5 the purpose of holding these assets, prosecuting them,  
6 increasing their value including the servicing rights and  
7 protecting upstream Silar as the holder of the parent of Asset  
8 Resolution. That was its purpose.

9           There is nothing to reorganize and we all know that  
10 there are extensive case and case authorities for similar  
11 attempts when the Court properly identifies them as forum  
12 selection or forum avoidance procedures. For that reason, the  
13 Court will convert. I will also convert the case for all of  
14 the reasons listed in the moving papers with which I totally  
15 agree. Those are also bases and grounds for conversion of  
16 case. There is nothing to reorganize here. There are assets  
17 to protect in a Chapter 7 and for the reasons Counsel -- and  
18 suggested by Counsel, an independent trustee, especially one in  
19 a Chapter 7, can look into the prior administration of these  
20 assets.

21           Remember and recall, please, as an aside that the  
22 Court acknowledged the transfer to Asset Resolution but never  
23 approved it. I issued injunctions to preserve the rights of  
24 Compass and, of course, Silar as well but in my mind I did not  
25 resolve the question whether it was appropriate or rightful as

1 opposed to wrongful to further transfer these servicing rights  
2 without permission of the Court to another entity such as Asset  
3 Resolution. It's now obvious to me that that transfer as well  
4 as the subsequent counseled Chapter 11 was wrongful and  
5 wrongful in motivation and intent warranting further the remedy  
6 here.

7           Expressly, I am converting these cases ordering the  
8 U.S. Trustee to name a trustee forthwith. This is a speaking  
9 order. Expressly, the trustee does not have authority to  
10 continue to operate any business of Asset Resolution including  
11 servicing of loans under servicing agreements or LSAs, as we've  
12 referred to them previously. I don't know that that order  
13 automatically terminates the servicing rights but I intend in  
14 the separate adversary proceedings and in the separate cases  
15 filed originally in this case to issue orders now that clearly  
16 instruct that those servicing rights were either terminated  
17 previously by the wrongful conduct of Compass and/or Silar  
18 and/or that there was full right to terminate them at the time  
19 any one of those deeds of trust or representatives of the same  
20 acquired a 51-percent vote or more to terminate Compass and/or  
21 Silar and/or Asset Resolution.

22           I'll issue those rulings but regardless of that, I'm  
23 expressly not authorizing, as the Bankruptcy Code otherwise  
24 gives me the authority to do, the trustee to operate that  
25 business. So where does that leave us? We will have a

1 trustee, of course. That trustee will function as the trustee  
2 for the operating managing member of any SPE that already has  
3 title and with respect to those that do already have a  
4 foreclosure or those that do not, Ms. Chubb, you may see to a  
5 solicitation or a request of 51 percent or more of each and  
6 every note and deed of trust and the 51 percent or more  
7 interest in any SPA-held title.

8           You may seek direction from those 51 percent or more  
9 members of what they want to do, whether they want to appoint a  
10 new servicing agent, whether they want to undertake the  
11 servicing of the note without a servicing agent, whether they  
12 just simply want to leave the title presently within SPE with a  
13 newly appointed trustee understanding that that trustee, of  
14 course, would be the one who would be managing the SPE. Fifty-  
15 one percent of the members of the direct lenders have the right  
16 to so dictate. So for example, in response to Mr. Kirby's  
17 comments and concerns, I certainly echo those and agree,  
18 Mr. Kirby. If there is an SPE that has entered into  
19 arrangements, the trustee will now be the voting party in that  
20 managing member but subject to the fiduciary duties, of course,  
21 he only -- he or she only holds legal title, nominal legal  
22 title and he or she must take the direction of 51 percent or  
23 more.

24           So specifically I will order that the trustee turn  
25 over forthwith any servicing right as demanded or requested by

1 51 percent or more and really the only person that I'm really  
2 trusting to make sure that we have a proper vote is Ms. Chubb.  
3 There will be a trustee but you will make sure, Ms. Chubb, that  
4 51 percent of each and every note and deed of trust and each  
5 and every SPE has either a proper vote or no vote. If there's  
6 no vote, for example, on an SPE, no direction from 51 percent  
7 or more, then we must all acknowledge that the newly appointed  
8 trustee is, in essence, not a servicer of course but holds  
9 title and has the fiduciary obligation to represent and to  
10 pursue and enforce the views of 51 percent or more as he or she  
11 may receive them.

12           There is no need to reorganize, no opportunity to  
13 reorganize and I think I've answered the question as to why  
14 this is the different kind of case and in such cases -- and we  
15 have a number of them on the books -- the Courts do convert and  
16 declare an effort to reorganize at an end. I have denied and  
17 will deny the Motion to Extend the Time for Exclusive Plan as  
18 moot.

19           I'm also terminating at this time any and all  
20 injunctions. The injunction issued by Judge Regal, the  
21 injunctions heretofore issued by myself, they're at an end.  
22 Those injunctions were to protect Silar -- Compass first, Silar  
23 secondarily in their servicing rights acquisition. There's no  
24 longer any need to do that and so I am terminating those  
25 injunctions forthwith. It is now up to the direct lenders what

1 they want to do. I certainly acknowledge some of the  
2 arguments. The problem in this case, especially when  
3 Ms. Cangelosi held sway to some extent, was that we could not  
4 get consensus and Silar complained, rightly so, at various  
5 stages of these cases that they could not get consensus. They  
6 couldn't even get response and therefore they felt they had a  
7 fiduciary obligation to simply protect the properties.

8 But there is now no longer a need for those  
9 injunctions either to protect Silar or Compass in their  
10 servicing rights or to protect the properties. The direct  
11 lenders will protect themselves and they can protect themselves  
12 by a 51-percent vote saying you'll put this SPE into a Chapter  
13 11 or you'll put this SPE into a direct default situation by  
14 our not covering the tax default payments, for example, or  
15 you'll put this SPE under the jurisdiction and authority of a  
16 new servicing agent that we will designate.

17 So the direct lenders will protect themselves, it  
18 becoming very obvious to the Court that neither nor  
19 Ms. Cangelosi nor Compass nor Silar nor Asset Resolution were  
20 either effective or in good faith in their attempts to preserve  
21 or protect these assets for the benefit of all direct lenders.

22 I am specifically revoking the DIP authorization in  
23 the Chapter 11. I'm glad to hear that it has not been funded.  
24 There is no longer a purpose for it or intent. I'm  
25 specifically revoking that order. There is no authorization to

1 complete or fund or sign documents or do anything further in  
2 support of that DIP financing.

3 Any other clarifications to this speaking order?  
4 I'll expect, of course, order to embody the Court's rulings  
5 with the reasons here stated on the record. Please?

6 **MS. RASMUSSEN:** Your Honor, just a jurisdictional  
7 issue. I had filed an appeal to the Ninth Circuit of the order  
8 denying my motion to vacate the preliminary injunction and so I  
9 don't want you and I to get in trouble with the circuit and so  
10 to the extent that you intend -- I'm not free of jurisdiction  
11 to vacate it right now and I just don't want us to get in  
12 trouble. So I -- one thing I can do is withdraw the appeal.

13 **THE COURT:** I'm not afraid of getting in trouble.

14 **MS. RASMUSSEN:** Maybe it's just me and I don't want  
15 to drag you down with me.

16 **THE COURT:** I'm doing it. If I don't have  
17 jurisdiction, of course, somebody will tell me that.

18 **MS. RASMUSSEN:** I think I can withdraw the appeal and  
19 then the order -- I mean, that you've indicated your intent  
20 today, I think it can be handled that way but since that's the  
21 entire subject matter of the appeal, I think it would be  
22 problematic. So I think perhaps that's what I should ask them  
23 for a stipulation to withdraw the appeal upon the consent of my  
24 clients, which I'm sure they will, and then your order can be  
25 entered therewith. Okay?

1           **MR. HOWARD:** Your Honor, I fully understand the  
2 Court's order but there is one perhaps unintended  
3 consequence --

4           **THE COURT:** All right, please.

5           **MR. HOWARD:** -- and that is I believe there are four  
6 pending tax sales from local authorities. I can think of one  
7 off the top of my head. It's scheduled for February 11<sup>th</sup> --

8           **THE COURT:** Of what? Not specific properties but of  
9 what? Of specific properties for tax sales?

10          **MR. HOWARD:** For separate specific properties.

11          **THE COURT:** Uh-huh.

12          **MR. HOWARD:** The one I'm thinking of is the Comdex  
13 (phonetic) property --

14          **THE COURT:** They're held by title to which is held by  
15 an SPE?

16          **MR. HOWARD:** No, the title of which is held by a  
17 borrower who has not yet been foreclosed upon who is --

18          **THE COURT:** So in other words, the automatic stay  
19 doesn't apply to stop those asset -- those tax --

20          **MR. HOWARD:** I would have thought the automatic stay  
21 up until today stayed the foreclosure because the servicer  
22 was --

23          **THE COURT:** Well, a conversion doesn't lift any stay.  
24 So --

25          **MR. HOWARD:** But the servicing rights --

1           **THE COURT:** -- my question though is why are you  
2 under the impression that there was an automatic stay against  
3 tax sales.

4           **MR. HOWARD:** I was --

5           **THE COURT:** The title wasn't held by the Debtor,  
6 right?

7           **MR. HOWARD:** I understood -- my understanding, your  
8 Honor --

9           **THE COURT:** Uh-huh.

10          **MR. HOWARD:** -- was that the tax foreclosure sale was  
11 stayed by virtue of the servicer not being in a Chapter 11  
12 case.

13          **THE COURT:** Why would you think that?

14          **MR. HOWARD:** Perhaps because I'm --

15          **THE COURT:** Because the Debtor has the servicing  
16 right?

17          **MR. HOWARD:** I'm not as sophisticated, perhaps, as  
18 some of the bankruptcy lawyers here and thought the automatic  
19 stay was very broad and kept the rights of the servicers, too  
20 but the point is it's not my issue -- not our issue but --

21          **THE COURT:** Right.

22          **MR. HOWARD:** -- if those tax foreclosure sales are  
23 eminent, Debtor's Counsel has been charged with the task of  
24 protecting those --

25          **THE COURT:** If there is a stay, the stay is already

1 still in place. I'm not lifting any stays. I'm simply  
2 converting the case. If there is not a stay in place or any  
3 fear of that whether in a Chapter 11 or in a Chapter 7, there  
4 should be action taken to make sure there is a stay. For  
5 example, in respect to the Gess loan, I ordered the stay. I  
6 said a sale or a deed on tax sale cannot occur for certain  
7 periods of time. I ordered that. I think somebody asked it or  
8 I suggested it and I specifically ordered that.

9 So if there is not an automatic stay in effect --  
10 which I'm not lifting in any regard -- or any doubt about that,  
11 the appropriate parties including the direct lenders if they  
12 need to protect themselves should make an appropriate request  
13 for an injunction.

14 **MS. CHUBB:** Well, if Asset Resolution has an interest  
15 in that property as an owner or as a junior secured creditor --

16 **THE COURT:** Well, here's the problem. You know, if  
17 it's been foreclosed upon, then clearly Asset Resolution as one  
18 of many direct lenders may have a title interest even if it's a  
19 beneficial title interest in the property and I would assume  
20 there's a stay --

21 **MS. CHUBB:** We'll look at that.

22 **THE COURT:** -- but simply as the holder of a  
23 servicing right on behalf of all other direct lenders, I don't  
24 think there's any automatic stay.

25 **MS. CHUBB:** I agree. We'll look into that and maybe

1 we could discuss with Counsel.

2           **THE COURT:** Yeah. I just caution you -- I thank you  
3 for raising the issue and I caution you, direct lenders need to  
4 be advised if there's not an automatic stay, they certainly  
5 ought to seek one and they are -- from this moment on that  
6 their own prejudice for protecting these properties.

7           **MS. CHUBB:** So I do have some questions.

8           **THE COURT:** Please.

9           **MS. CHUBB:** There are trust funds being held for the  
10 benefit of someone.

11           **THE COURT:** Those go immediately into the hands of a  
12 new trustee. The Debtor, under the Federal statute Title 11  
13 and the Rules, is mandated and directed without an additional  
14 order from me to immediately cooperate with that trustee in  
15 turning over assets, preserving the assets. All parties are on  
16 notice that this Court has exclusive jurisdiction, that any  
17 attempts to avoid this Court's exclusive jurisdiction will be  
18 met with proper sanctions, et cetera but that trustee, of  
19 course, I assume would take possession of those assets not as  
20 assets of an estate but as assets of the fiduciary of those  
21 funds.

22           **MS. CHUBB:** Okay, thank you. Then did you have in  
23 mind some specific procedure for implementing the 51 percent?  
24 Do you have desires or --

25           **THE COURT:** No. I'm going to leave that to you

1 because --

2 **MS. CHUBB:** I was afraid of that.

3 **THE COURT:** -- and that's the reason for doing that  
4 is --

5 **MS. CHUBB:** Okay, we'll do that.

6 **THE COURT:** -- because the direct lenders now are on  
7 notice they have --

8 **MS. CHUBB:** Yes.

9 **THE COURT:** -- to protect themselves.

10 **MS. CHUBB:** Okay.

11 **THE COURT:** This Court will not protect them any  
12 longer. If, of course, there is no 51-percent vote to take it  
13 to somebody else, then an SPE at least as well as a trustee who  
14 has the servicing rights but without authority to exercise them  
15 or operate them as a business presumably has the servicing  
16 right and the right to say what happens to a property but in  
17 the case of an SPE or a note that's held and where 51 percent  
18 do vote to take it to somebody else, the trustee will  
19 immediately comply with that.

20 **MS. CHUBB:** Okay. There may be some instances where  
21 we have to come back here before the District Court action or  
22 the bankruptcy --

23 **THE COURT:** Absolutely and as sitting in bankruptcy,  
24 I'll give you an immediate hearing --

25 **MS. CHUBB:** Okay, thank you.

1           **THE COURT:** -- if you need that help.

2           **MS. CHUBB:** Thank you.

3           **THE COURT:** Any other clarifications?

4           **MR. HOWARD:** The only other clarification, your Honor  
5 -- Randolph Howard as attorney for Asset Resolution. I heard  
6 the Court very loudly and clearly state its basis for  
7 converting including what the Court perceives as bad faith on  
8 the part of the people who filed the Chapter 11 case. This is  
9 not, as the Court well knows, a simple matter. I would ask the  
10 Court to indulge the parties who have a very real interest in  
11 preserving their good names justification and rationale for  
12 what they did -- ask the Court to give us the luxury of a  
13 factual hearing on that issue.

14           **THE COURT:** It goes without saying. That's why I  
15 invited the motions. I did not rule.

16           **MR. HOWARD:** I was just asking for a factual hearing  
17 in addition to just the normal law and motion proceeding if the  
18 Court will please.

19           **THE COURT:** Very good. Let's see. The application  
20 to authorize retention of financial advisors is moot and the  
21 trial setting -- of course, the Court has -- didn't I already  
22 lift the stay on the separate adversary proceedings withdrawn  
23 and/or those filed here?

24           **MS. CHUBB:** We thought so.

25           **THE COURT:** I thought so, too. I've lifted that

1 stay. So we do have a trial setting. I'm sure we need to  
2 further -- I promised you that we would further set dates as  
3 appropriate to the extent we still need them and I think we  
4 probably still do. You may be -- may need consultation about  
5 what issues remain to be tried but we certainly need a trial  
6 date.

7 **MR. KLESTADT:** Your Honor, on that point with regard  
8 to the declaratory judgment action which your Honor at the last  
9 hearing acknowledged and thanked us for the favor of commencing  
10 the action against the various direct lenders --

11 **THE COURT:** That was the State Court removed here to  
12 this --

13 **MR. KLESTADT:** No. No, your Honor.

14 **THE COURT:** No.

15 **MR. KLESTADT:** We started a separate action in the  
16 Bankruptcy Court --

17 **THE COURT:** Uh-huh. Oh, yes and I withdrew that one.

18 **MR. KLESTADT:** That's correct, your Honor. My  
19 question is that now, I believe, the exclusive plaintiff is the  
20 Chapter 7 trustee.

21 **THE COURT:** That's correct.

22 **MR. KLESTADT:** So I think before setting a trial  
23 schedule, you need to have the Chapter 7 trustee appointed  
24 before you.

25 **THE COURT:** That's true and that Chapter 7 trustee

1 may decide to retain the same Counsel to prosecute that or may  
2 decide to retain separate Counsel.

3 **MR. KLESTADT:** Your Honor, part -- if I may, part and  
4 parcel of the entire strategy of putting this in the Chapter 11  
5 was to bring that action before a Bankruptcy Court whether in  
6 New York, here or before your Honor withdrawing the matter. I  
7 gave that advice, your Honor. There was no bad faith intended.

8 **THE COURT:** Okay.

9 **MR. KINEL:** Your Honor, I -- Norman Kinel on behalf  
10 of the soon to nonexistent committee, I guess. Clarification,  
11 your Honor, the committee was appointed and Counsel was  
12 retained pursuant to an order of the Court. There was a  
13 financial advisor application before your Honor and the funding  
14 for professional fees in this case were to -- was to come from  
15 the DIP lender who is an affiliate of the Debtors and a  
16 reliance upon that funding, the professionals were retained and  
17 engaged.

18 **THE COURT:** Of course, the orders of retention are in  
19 place. I can appreciate that the expectation for payment may  
20 be frustrated and, of course, Counsel have every right to do  
21 whatever they need to do but the orders of retention are in  
22 place and there was a request to nunc pro tunc retained which I  
23 just approved and signed today as well.

24 **MR. KINEL:** Well, with respect to the financial  
25 advisors, your Honor ruled that it was moot and I would just

1 make a point that in order for them to have the right to come  
2 to this Court and seek compensation for what they did, I think  
3 they would need an order of the Court even though they  
4 certainly would not be performing any services --

5 **THE COURT:** I'm sorry. I don't think we're picking  
6 up a good record.

7 **(Loud speaker heard in the courtroom)**

8 **THE COURT:** Just a classroom tip. I'm sorry.

9 **MR. KINEL:** I have two points, your Honor. One is  
10 sort of as a ministerial matter. I would respectfully request  
11 that the Court approve the retention of the financial advisors  
12 and their services will be immediately terminated but at least  
13 they'd be in a position to come back and ask the Court for  
14 approval of the fees that they incurred to date.

15 **THE COURT:** I will deny that. It is moot.

16 **MR. KINEL:** The second request is, I guess, a  
17 clarification on the DIP financing. I'd like to understand --  
18 if the Court's denying the funding of DIP financing -- which I  
19 don't understand whose prejudice that would be since without  
20 that financing, there is -- there will be -- I guess ultimately  
21 the application could be made but the insider of this Debtor  
22 was willing to spend money to administratively maintain this  
23 case.

24 **THE COURT:** Sure. If that's a question, it is  
25 clearly to the prejudice of direct lenders and direct lender

1 interests. I am revoking it. I was glad to hear that it had  
2 not been funded. If it had been funded, of course, rights  
3 would have accrued but it has not been funded. I am  
4 specifically revoking the order.

5 **MR. KLESTADT:** Your Honor, may I address that point?

6 **THE COURT:** Sure.

7 **MR. KLESTADT:** That is not, your Honor. There is a  
8 specific --

9 **THE COURT:** What's not accurate?

10 **MR. KLESTADT:** With regard to the debtor-in-  
11 possession financing, there's a specific -- I don't have it in  
12 front of me but there's a specific paragraph in the order that  
13 says that the incurrence of the loan and the collateral  
14 securing the loan is not as against any ownership interest of  
15 the direct lenders but solely as against Asset Resolution. It  
16 was designed specifically so that there would be no detriment  
17 to the direct lenders. So I do not understand how your Honor  
18 comes to that conclusion.

19 **THE COURT:** Okay.

20 **MR. KLESTADT:** It does not act to their detriment.

21 **THE COURT:** Are you asking me to argue with you or --

22 **MR. KLESTADT:** No, your Honor, I'm not asking you to  
23 argue. It's an incorrect conclusion and the detriment --  
24 Mr. Kinel I think correctly points out. The detriment,  
25 frankly, is to the professionals.

1           **THE COURT:** I appreciate your pointing that out.

2           **MR. KLESTADT:** Thank you, your Honor.

3           **THE COURT:** Anything else? That's the order.

4 Ms. Chubb, could I give you the initial legwork of preparing  
5 orders? I've given my reasons here on the record. You may  
6 allocate that burden as you see fit.

7           **MS. CHUBB:** I'm really good at delegating.

8           **THE COURT:** Good.

9           **MS. CHUBB:** Yes, we will.

10          **THE COURT:** Okay.

11          **MS. CHUBB:** Yes, we will prepare all the orders you  
12 think arise out of today.

13          **THE COURT:** And does the U.S. Trustee have a trustee  
14 that you already have in mind to name?

15          **MS. BLOOM:** Your Honor, when a case converts from an  
16 11 to a Chapter 7, it goes by rotation. We do not specifically  
17 appoint anyone.

18          **THE COURT:** Okay. Could you provide that name to  
19 these parties no later than tomorrow morning --

20          **MS. BLOOM:** Yes, absolutely.

21          **THE COURT:** -- to see if there's any objection and  
22 forthwith get the order in place? This, again, was a speaking  
23 order relative to conversion.

24          **MS. BLOOM:** Thank you.

25          **THE COURT:** Okay. Thank you.

1                   **MS. UNIDENTIFIED:** Thank you very much, your Honor.

2                   **MR. UNIDENTIFIED:** Thank you, your Honor.

3                   **THE CLERK:** All rise.

4                   **(This proceeding was adjourned at 5:11 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is positioned above a horizontal line.

January 21, 2010

TONI HUDSON, TRANSCRIBER